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Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Yamatji Marlpa Aboriginal Corporation's Amended Position on Points of Claim and Points of Response

(Pursuant to order 2 made by Mortimer J on 28 February 2023)

Federal Court of Australia
District Registry: Western Australia
Division: General

WAD 37/2022

YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC

Applicant

STATE OF WESTERN AUSTRALIA & ORS

Respondents

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A Introduction

A1 Definitions and interpretation

1. Unless the context suggests otherwise, terms used in this document have the same meaning as in the NTA.
2. In this document:
 - (a) **Application** means native title compensation application WAD 37/2022, as amended (or proposed to be amended) as at the date of this document.
 - (b) **AHA** means the *Aboriginal Heritage Act 1972 (WA)*, as in force at the date of the act or event referred to, unless otherwise stated.
 - (c) **Claim Area** means the area covered by the Application, as described in Schedule B of the Form 4.
 - (d) **Common Law Holders** means the Yindjibarndi People, being the persons described in Schedule 6 to the Yindjibarndi Determination.
 - (e) **Compensable Acts** means the acts identified at POC [8].
 - (f) **Constitution** means the *Constitution of Australia 1901 (Cth)*.
 - (g) **Determination Area** has the same meaning as in paragraph [11] of the Yindjibarndi Determination.
 - (h) **Exclusive Area** has the same meaning as in paragraph [11] of the Yindjibarndi Determination.
 - (i) **Exclusive Native Title** means the native title rights and interests described in paragraph [4] of the Yindjibarndi Determination.
 - (j) **FMG** means the respondents FMG Pilbara Pty Ltd, Pilbara Energy (Generation) Pty Ltd, Pilbara Energy Company Pty Ltd, Pilbara Gas Pipeline Pty Ltd and Pilbara Infrastructure Pty Ltd.
 - (k) **FMG POR** means the *FMG Respondents' Amended Points of Response* filed ~~20~~ 23 February 2023.

- (l) **FR POR** means the *First Respondent's Points of Response* filed 20 February 2023.
- (m) **Form 4** means the native title compensation application filed on behalf of Yindjibarndi Ngurra Aboriginal Corporation RNTBC on 16 February 2022, as amended from time to time.
- (n) **Griffiths** means *Northern Territory v Griffiths* [2019] HCA 7; 269 CLR 1.
- (o) **Mining Act** means the *Mining Act 1978 (WA)* as in force at the date of the act or event referred to, unless otherwise stated.
- (p) **Mining Leases** means the mining leases identified at POC [8(a)].
- (q) **Mining Regulations** means the *Mining Regulations 1981 (WA)* as in force at the date of the act or event referred to, unless otherwise stated.
- (r) **Non-Exclusive Area** means the Determination Area excluding the Exclusive Area.
- (s) **Non-Exclusive Native Title** means the native title rights and interests described in paragraph [3] of the Yindjibarndi Determination.
- (t) **NTA** means the *Native Title Act 1993 (Cth)*.
- (u) **POC** means the *Applicant's Amended Points of Claim* filed 5 December 2022.
- (v) **private land** has the meaning given to it in section 8 of the *Mining Act*.
- (w) **RDA** means the *Racial Discrimination Act 1975 (Cth)*.
- (x) **Warrie Claim** means native title determination application WAD 6005/2003, filed on 9 July 2003.
- (y) **Yindjibarndi Determination** means the determination in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)* [2017] FCA 1299; 366 ALR 467.
- (z) **YMAC** means Yamatji Marlpa Aboriginal Corporation (ICN: 2001).

A2 YMAC's role in relation to the Application

3. YMAC is, pursuant to and for the purposes of the NTA, the *native title representative body* for the Pilbara region, in which the Claim Area is located.
4. On the basis of [3] and section 203BB NTA, YMAC:
 - (a) has statutory functions to facilitate and assist their constituents (as that term is used in section 203BF(2) NTA), including with compensation claims; and
 - (b) represents persons who have, or are likely to have, an entitlement to compensation in respect of their native title rights and interests, including arising under the NTA.
5. Any determination of the Application will, or is likely to, set a precedent applicable to compensation applications in respect of future acts granted under the *Mining Act*.
6. The proper interpretation and application of the provisions of Part 2 Division 5 NTA, and sections 123 and 125A of the *Mining Act*, hold implications for YMAC's constituents and clients who have, or are likely to have, a compensation entitlement in respect of future acts granted under the *Mining Act*.
7. On the basis of [4]-[6] above, YMAC views its role in the proceedings as being largely concerned with matters of legal principle, rather than matters of fact. Accordingly:
 - (a) this document focuses upon setting out YMAC's position in respect of a number of matters of legal principle, rather than responding to every aspect of the other parties' pleadings; and
 - (b) where there are parts of the POC which YMAC is unable to admit on the basis of YMAC's present state of knowledge, but which do not intrude on matters relevant to YMAC's interests, YMAC states that it takes no position.

B The Native Title and Entitlement to Bring the Application

8. YMAC admits POC [1] and [2].
9. In response to POC [3], YMAC adopts FR POR [9].
10. YMAC takes no position in relation to POC [4].
11. In relation to POC [5], YMAC admits that the Common Law Holders hold Exclusive Native Title in the Exclusive Area.
12. In response to POC [6], FMG POR [5]-[6] and FR POR [12], YMAC says that:
 - (a) as a matter of traditional law and custom, the Common Law Holders' right to possession, occupation, use and enjoyment of the Exclusive Area has always existed and has never been extinguished;
 - (b) the prior extinguishment of the Common Law Holders' right to possession, occupation, use and enjoyment of the Exclusive Area arose from the withdrawal of recognition by the Australian legal system on the basis of inconsistent grants;
 - (c) sections 47A(2) and 47B(2) NTA operate to disregard "any extinguishment" of the native title rights and interests;
 - (d) sections 47A(2) and 47B(2) are operative from the test time provided in sections 47A(1) and 47B(1) respectively, which is the date when the *Warrie* Claim was filed, being 9 July 2003;
 - (e) on the basis of Attachment I to the Form 4, each one of the Compensable Acts was done after 9 July 2003;
 - (f) the effect of the Yindjibarndi Determination is that:
 - (i) the Exclusive Native Title has always existed in the Exclusive Area, subject to the application of sections 47A(3) and 47B(3) NTA; or
 - (ii) alternatively, the Exclusive Native Title has existed in the Exclusive Area since 9 July 2003; and
 - (g) section 51(1) NTA, which is within Part 2 Division 5 NTA, provides that the entitlement to compensation under Part 2 Division 3 is an entitlement on just

terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on *the native title*,

such that, for the purposes of determining compensation in respect of the Compensable Acts, the native title in respect of which there is an entitlement to compensation is, to the extent the Compensable Acts are within the Exclusive Area, the Exclusive Native Title.

13. In response to POC [7], YMAC admits that, in the Non-Exclusive Area, the Common Law Holders hold the Non-Exclusive Native Title.

C The Claimed Compensable Acts

15. YMAC admits POC [8] on the understanding that the POC prevails over Attachment I to the Form 4.
16. YMAC takes no position in relation to POC [9], [10] or [11].
17. YMAC admits POC [12].
18. YMAC takes no position in relation to POC [13] but, in response to FMG POR [13(e)], denies that the miscellaneous licences identified by FMG as **Water Management Miscellaneous Licences** were valid future acts pursuant to section 24HA(3) NTA, because:
 - (a) pursuant to section 91(1) of the *Mining Act*, miscellaneous licences granted may only be granted for the purposes prescribed in regulation 42B of the *Mining Regulations*;
 - (b) the purposes associated with each of the Water Management Miscellaneous Licences are as follows:

	Tenement	Purposes
1.	L47/302	Road, power line, pipeline, taking water, and a conveyor system
2.	L47/361	Pipeline, power line, road, taking water, communication facility, bore field, aerial rope way, aerodrome, conveyor system, power generation, transmission facility and storage or transportation facility for minerals or mineral concentrate
3.	L47/362	Pipeline, power line, road, taking water, communication facility, bore field, aerial rope way, Aerodrome, conveyor system, Power Generation, Transmission facility, and storage or transportation facility for minerals or mineral concentrate
4.	L47/363	Pipeline, power line, road, taking water, communication facility, water management facility, bore field, aerial rope way, conveyor system, and storage or transportation facility for minerals or mineral concentrate
5.	L47/367	Road, power line, pipeline, taking water, communication facility, water management facility, aerial rope way, conveyor system, and storage or

		transportation facility for minerals or mineral concentrate
6.	L47/396	Road, pipeline, power line, taking water, communications facility, water management facility, bore field and bore
7.	L47/472	Road, a bore field, a power line, a pipeline, taking water, a communications facility, a water management facility and a minesite accommodation facility.
8.	L47/697	A bore, a bore field, a communications facility, a pipeline, a pump station, a road, a tunnel, a workshop and storage facility and taking water
9.	L47/801	A bore, a bore field, a communications facility, a pipeline, a power line, a pump station, a road, a workshop and storage facility, taking water and a water management facility
10.	L47/813	A bore, a bore field, a communications facility, a pipeline, a power line, a pump station, a water management facility, a workshop and storage facility and taking water
11.	L47/814	A bore, a bore field, a communications facility, a pipeline, a power line, a pump station, a road, a water management facility, a workshop and storage facility and taking water
12.	L47/914	A bore, a bore field, a communications facility, a pipeline, a power line, a road, a search for groundwater and taking water
13.	L47/919	A bore, a bore field, a communications facility, a pipeline, a power line, a pump station, a road, a search for groundwater, a water management facility, a workshop and storage facility and taking water

- (c) on the basis of [18(b)] above, each of the Water Management Miscellaneous Licences included at least one regulation 42B prescribed purpose which did *not* relate to the management or regulation of: surface and subterranean water; or living aquatic resources; or airspace;
- (d) on the proper construction of section 24HA(2) NTA, a miscellaneous licence which includes one or more regulation 42B prescribed purposes which do *not* relate to the management or regulation of: surface and subterranean

- water; or living aquatic resources; or airspace, is *not* an act to which Subdivision H applies;
- (e) on the basis of [18(c)-(d)] above, none of the Water Management Miscellaneous Licences are:
- (i) grants under legislation that relates to the management or regulation of: surface and subterranean water; or living aquatic resources; or airspace, for the purposes of section 24HA(2) NTA; or
 - (ii) acts which are valid future acts pursuant to section 24HA(3) NTA;
- (f) on the basis of [18(c)-(d)] above and [23(a)-(f)] below, Part 2, Division 3, Subdivision M NTA applies to the Water Management Miscellaneous Licences.
19. YMAC takes no position in relation to POC [14], save for the matters of legal principle set out at [40]-[41] and [44] below.
20. With respect to POC [15], FMG POR [15] and FR POR [195]:
- (a) In response to FR POR [195], YMAC says, for the avoidance of doubt, that:
 - (i) there is no requirement, under the NTA or otherwise, for native title holders to bring a single compensation application relating to all potentially compensable acts within a determination or claim area (including a compensation claim area); and
 - (ii) not including all potentially compensable acts for a particular area in a compensation claim brought on behalf of a group of native title holders does not preclude a further compensation claim being brought on behalf of that group and determined over the same area in relation to acts that were not the subject of the earlier claim.
 - (b) In response to FMG POR [15(c)], YMAC says that:
 - (i) as at the date of these pleadings, the following Compensable Acts fall partly within the Claim Area, and partly in the area of a neighbouring native title determination, as identified in the table below:

	Tenement	Other relevant native title group
1.	E47/1333-I	Eastern Guruma
2.	E47/1334-I	Eastern Guruma
3.	E47/1334-I	Eastern Guruma
4.	E47/3464-I	Eastern Guruma
5.	L 1SA	Puutu Kunti Kurrama People and Pinikura People #1 and #2; Eastern Guruma; Banjima; Palyku; Kariyarra
6.	L47/697	Banjima
7.	L47/813	Eastern Guruma
8.	L47/814	Eastern Guruma
9.	L47/914	Banjima
10.	L47/919	Eastern Guruma
11.	M47/1409-I	Eastern Guruma
12.	M47/1411-I	Eastern Guruma

- (ii) on its proper construction, section 49(a) NTA:
- (A) refers to compensation payable through an order of the Court to the native title holders;
- (B) does not have the effect that, where a Compensable Act is only partly within the Claim Area, a compensation determination in this proceeding precludes other native title holders from separately claiming and receiving a determination of compensation in respect of that part of a Compensable Act that causes any loss, diminution, impairment or other effect on their native title.
- (iii) on the basis of [20(b)(ii)] above, a compensation determination in the Application in relation to the Compensable Acts will not, by virtue of section 49(a) NTA:

- (A) deprive other native title groups of an entitlement to compensation in respect of any Compensable Act; or
- (B) otherwise preclude an application being brought on behalf of those other native title groups seeking an award of compensation in respect of any Compensable Act as it relates to their native title.

D Entitlement to Compensation

D1 YMAC's primary position

21. YMAC's primary position is that, in respect of each of the Compensable Acts, the Common Law Holders are entitled to compensation for the act, and its effects, on the basis of section 24MD(3)(b) NTA which, in accordance with section 51(1) NTA, is an entitlement on just terms to compensation for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

D2 Entitlement to be determined in accordance with Part 2, Division 3 NTA

22. In response to POC [16], FMG POR [16], and FR POR [220], YMAC:

- (a) repeats [18] above, and denies FMG POR [16(f)(i)].
- (b) denies FR POR [209]-[211].
- (c) admits that:
 - (i) as the Common Law Holders are entitled to compensation for the Compensable Acts under section 24MD(3)(b) NTA; or
 - (ii) if the Common Law Holders are entitled to compensation for the Compensable Acts on the basis of section 10 RDA and section 45 NTA; and/or
 - (iii) if the Common Law Holders are entitled to compensation for the Compensable Acts on the basis of section 53(1) NTA; and/or
 - (iv) if the Common Law Holders are entitled to compensation in respect of the Water Management Miscellaneous Licences under section 24HA(5) NTA, as alleged at FMG POR [16(f)(i)],

the entitlement to compensation is to be determined in accordance with Part 2, Division 5 NTA.

D3 Entitlement to compensation under section 24MD(3)(b) NTA

23. YMAC admits POC [17]-[20] on the basis that:

- (a) The Compensable Acts are *future acts*;

- (b) The Compensable Acts are acts other than the making, amendment or repeal of legislation;
- (c) The Compensable Acts relate to an onshore place for the purposes of section 24MC NTA;
- (d) The Compensable Acts could be done in relation to the Claim Area if the Common Law Holders instead held *ordinary title* to it;
- (e) The AHA was, at the time each of the Compensable Acts were done, a law of the State that made provision of the kind referred to in section 24MB(1)(c) NTA;
- (f) On the basis of (a)-(e) above, and in accordance with section 24MB NTA, Part 2, Division 3, Subdivision M NTA applies to the Compensable Acts;
- (g) By reason of (f), pursuant to section 24MD(3)(a) NTA, the *non-extinguishment principle* applies to each of the Compensable Acts;
- (h) Each of the Compensable Acts relates to an onshore place within the meaning of section 240(a) NTA;
- (i) If the Common Law Holders held *ordinary title* to the land the subject of each Compensable Act, then the Common Law Holders would:
 - (i) be an 'owner' (and 'occupier') of the land the subject of each tenement, within the meaning of those terms in the *Mining Act*; and
 - (ii) as such, be entitled to compensation in accordance with section 123 of the *Mining Act*;
- (j) The entitlement to compensation referred to in (i)(ii) above constitutes compensation 'for the act' within the meaning of section 240(b) NTA;
- (k) By reason of the matters in (h)-(j) above, the *similar compensable interest test* is satisfied in relation to each Compensable Act, within the meaning of section 24MD(3)(b)(i) NTA;
- (l) The *Mining Act* does not provide for compensation to the Common Law Holders for each of the Compensable Acts because the Common Law

Holders are not 'owners' or 'occupiers' within the meaning of those terms in the *Mining Act*; and

- (m) By reason of (f), and (h)-(l) above, the grant of each of the Compensable Acts gave rise to an entitlement to compensation in accordance with section 24MD(3)(b) NTA.

24. YMAC further says that:

- (a) the entitlement to compensation in [23(m)] above:
 - (i) is, on the basis of section 51(1) NTA, an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests;
 - (ii) is taken to have arisen on the date the Compensable Act was done, which is the date each Compensable Act was granted (which may not be the first day of the term of the act); and
 - (iii) for the avoidance of doubt, arises in respect of each of the Compensable Acts regardless of whether a particular Compensable Act was:
 - (A) also subject to Part 2, Division 3, Subdivision P NTA;
 - (B) also subject to s 24MD(6B) NTA;
 - (C) granted by way of the expedited procedure under ss 32 and 237 NTA; and/or
 - (D) invalid by reason of a failure to comply with any of those provisions of the NTA;
- (b) 'just terms' in the context of section 51(1) NTA means that the Common Law Holders are entitled to be fully compensated for any loss, diminution, impairment or other effect of the Compensable Acts on the native title rights and interests.

25. YMAC:

- (a) denies FMG POR [17(b)] and [18(b)], and repeats [18] above.
- (b) denies FR POR [209]-[211], [222(b)] and [224], and repeats [23(l)] above.
- ~~(c) in response to FMG POR [20(b)], says that:
 - ~~(i) it presumes the reference to s 24MD(3)(ii) is intended to be a reference to s 24MD(3)(b)(ii); and~~
 - ~~(ii) it does not understand POC [20] to be alleging that the precondition under section 24MD(3)(b)(ii) is *not* satisfied, but as alleging that the precondition *is* satisfied, because the *Mining Act* does *not* provide for compensation to the Common Law Holders for the Compensable Acts.~~~~

D4 Entitlement to compensation under section 10 RDA and section 45 NTA

26. Regarding POC [21]-[23], FMG POR [21]-[23] and FR POR [225], YMAC:

- (a) in response to FMG POR [21(e)], repeats paragraph [12] above and says that a finding of 'occupation' for the purposes of sections 47A(1)(c) and 47B(1)(c) NTA is a finding of occupation as at the time the *Warrie* Claim was made;
- (b) denies FR POR [225(c)(ii)] on the basis that:
 - (i) section 123(5) of the *Mining Act* confers an additional entitlement to compensation to the owner or occupier of private land adjoining or in the vicinity of land where mining takes place (as distinct from land where mining takes place), but not to the owner or occupier of Crown land; and
 - (ii) section 123(6) of the *Mining Act* confers an additional entitlement to compensation on the owner or occupier of private land where damage is caused, by mining operations, to private land within a mining tenement's boundaries (as distinct from land where mining takes place), but not to the owner or occupier of Crown land.
- (c) repeats paragraphs [23]-[24] above; and

- (d) says that, on its proper construction, section 51(3) NTA does not have the effect that the entitlement provided by section 51(1) NTA can be met by the provision of compensation which is less than just terms, such that, on the basis of sections 51(1) and 51(3) NTA, the Common Law Holders are, regardless of the application of section 45 NTA, entitled to compensation on just terms.

D5 Entitlement to compensation under section 53 NTA

27. In response to POC [24]-[26], FMG POR [24]-[26] and FR POR [226], YMAC:

- (a) repeats paragraphs [23]-[24] above;
- (b) says that, upon the grant of each of the Mining Leases, on the basis of section 24MD(3)(a) NTA:
 - (i) in relation to those Mining Leases which fall partly or wholly within the Exclusive Area:
 - (A) the native title right of the Common Law Holders pursuant to the Exclusive Native Title to exclude the tenement holder from the area of the Mining Lease was wholly suppressed; and
 - (B) the holder of the Mining Lease acquired the right to exclude the Common Law Holders from the area of the Mining Lease in accordance with the *Mining Act*, and any conditions to which a particular Mining Lease was subject;
 - (ii) the Common Law Holders' entitlement to exercise and enjoy their native title rights and interests without interference by others, was made subject to the tenement holder's entitlement to exercise and enjoy the rights associated with each of the FMG Mining Leases without interference by others.
- (c) repeats paragraph [26(d)]; and
- (d) says further that if, at the time a compensation determination is made:
 - (i) section 125A of the *Mining Act* applies pursuant to section 24MD(4)(b) NTA; and

- (ii) there is no person of the kind referred to in section 125A of the *Mining Act* who is capable of paying the compensation, or no person who in fact does pay the compensation, in accordance with the Court's determination,

then either:

- (iii) the First Respondent is liable to pay the compensation; or
- (iv) alternatively, the Common Law Holders have an entitlement to compensation against the First Respondent under section 53(1) NTA.

E Liability to Pay Compensation

28. YMAC admits POC [27].
29. In response to POC [28], FMG POR [28], and FR POR [235], YMAC repeats paragraphs [18] and [23]-[25] above.
30. In response to POC [29]-[30], FMG POR [29]-[30] and FR POR [236]-[237], YMAC:
- (a) admits that section 125A of the *Mining Act* was in force when each of the Compensable Acts was done;
 - (b) denies FMG POR [29(f)] and repeats paragraphs [18] and [23]-[25] above;
 - (c) admits that if, which is denied, the Water Management Miscellaneous Licences are acts in relation to which a compensation entitlement arises under section 24HA(5) NTA, the First Respondent is liable to pay the compensation;
 - (d) denies FMG POR [29(g)-(h)] and says that section 125A of the *Mining Act* is not invalid by force of section 109 of the Constitution;
 - (e) says that, on the proper construction of section 125A of the *Mining Act*, the Applicant can recover the compensation entitlement pursuant to section 24MD(3)(b) NTA from either:
 - (i) the applicant for the grant of the tenement; or
 - (ii) the holder of the tenement at the time a determination of compensation is made, or if there is no holder because the tenement has been surrendered or forfeited or has expired, the holder of the tenement immediately before its surrender, forfeiture or expiry; and
 - (f) further to (e), says that if, at the time a determination of compensation is made under the NTA, there is no person of the kind referred to in section 125A of the *Mining Act* who is capable of paying the compensation, or no person who in fact does pay the compensation, in accordance with the Court's determination, then:

- (i) section 125A of the *Mining Act* does not, in its practical operation and effect, provide that a person other than the Crown in right of Western Australia is liable to pay the compensation; and
- (ii) the Applicant is entitled to recover the compensation from the First Respondent,

and repeats paragraph [27(d)] above.

31. YMAC admits POC [31].

32. In response to POC [32], FMG POR [32] and FR POR [239], YMAC says that the First Respondent is liable to pay any compensation entitlement under section 53(1) NTA on the basis of section 53(1)(c) NTA.

F Principles or Criteria for Assessment of Compensation

F1 YMAC's primary position

33. YMAC's primary position is that, in respect of each of the Compensable Acts:

- (a) the entitlement under section 24MD(3)(b) NTA is, pursuant to section 51(1) NTA, an entitlement on just terms to compensation for any loss, diminution, impairment or other effect of the Compensable Act on the native title rights and interests of the Common Law Holders;
- (b) principles or criteria for determining the monetary value of the section 51(1) NTA entitlement are provided by section 51(3) NTA which, on its proper construction:
 - (i) requires the Court to apply the principles or criteria in section 123 of the *Mining Act* when determining the monetary value of the entitlement under section 51(1) NTA, whether or not those principles or criteria provide for compensation on just terms; but
 - (ii) does *not* have the effect that the entitlement under section 51(1) NTA in respect of the Compensable Acts can be met or fulfilled by a determination of monetary compensation which is less than just terms, or otherwise less than the entitlement; and
 - (iii) does not require the Court to apply *only* the principles or criteria for determining compensation set out section 123 of the *Mining Act* for the purposes of determining the monetary value of the entitlement to just terms compensation under section 51(1) NTA;
- (c) alternatively to (b), sections 51(1) and 51(3) NTA, read together, have the effect that:
 - (i) the Common Law Holders have an entitlement to compensation for any loss, diminution, impairment or other effect of the Compensable Act on their native title rights and interests, which is to be assessed according to the principles or criteria in section 123 of the *Mining Act*, whether or not on just terms; and

- (ii) the Common Law Holders' entitlement to compensation is to be assessed using the principles or criteria under the *Mining Act* which would be applicable to an *owner of private land*, regardless of whether the native title is Exclusive Native Title or Non-Exclusive Native Title, with such adaptations as are necessary to address the unique character of native title rights and interests, and in particular its cultural and spiritual aspect.

34. YMAC says that FR POR [247], [251], [254]-[257] and FMG POR [39] and [43] fail to account for the distinction established by the NTA between:

- (a) the *entitlement* to compensation, which is provided by section 51(1) NTA; and
- (b) the *principles or criteria to be applied* in determining the monetary compensation payable in respect of that entitlement, which are in general terms provided by sections 51(2), (3) or (4) and which are, in this proceeding, provided by section 51(3) NTA.

F2 Loss, diminution, impairment or other effects on native title

35. In response to POC [33], FMG POR [33] and FR POR [294], YMAC:

- (a) says that, pursuant to section 24MD(3)(a) NTA, the non-extinguishment principle applies to each of the Compensable Acts;
- (b) admits that the native title right of the Common Law Holders to exclude the tenement holders from the Exclusive Area has been wholly suppressed by the Compensable Acts to the extent the Compensable Acts are within the Exclusive Area;
- (c) admits that the exercise of rights held by the tenement holder under one or more of the Compensable Acts has resulted in:
 - (i) the native title rights and interests being wholly ineffective in some parts of the Claim Area, in accordance with section 238(3) NTA; and
 - (ii) the native title rights and interests being partly ineffective in some parts of the Claim Area, in accordance with section 238(4) NTA.

- (d) admits that the Compensable Acts have resulted in loss, diminution, impairment or other effects on the native title rights and interests of the Common Law Holders, including on the basis of (a)-(c) above;
- (e) admits that the loss etc. referred to in (d) above will continue for at least as long as the Compensable Acts remain on foot; and
- (f) says that the conduct of activities pursuant to one or more of the Compensable Acts has, or in future is likely to have, effects which continue after the end of the term of the Compensable Acts, which:
 - (i) mean that, for all practical purposes, native title rights and interests cannot be exercised in certain parts of the Claim Area; and
 - (ii) cannot be removed, or can only be partially removed, for the purposes of sections 238(6) and (7) NTA.

36. YMAC takes no position in respect of POC [34].

37. In response to POC [35], FMG POR [35], and FR POR [296], YMAC:

- (a) admits that the Compensable Acts have caused loss, diminution, impairment or other effects on the objective economic value of the native title rights and interests (**Economic Loss**); and
- (b) denies FR POR [296(b)] and refers to [38(a)(iv)(C)] below.

38. YMAC further says that Economic Loss is to be assessed:

- (a) on the basis of the objective economic value of the native title rights and interests, where the objective economic value of the native title:
 - (i) is the sum which the Applicant could fairly and justly have demanded for its assent to the infringement of the native title;
 - (ii) can be assessed as, or by reference to, any identifiable market value for the Applicant's assent to the infringement of the native title, being an amount a willing but not anxious party seeking the assent would be prepared to pay, and a willing but not anxious native title holding group would be prepared to accept, for their assent;

- (iii) is informed by the benefit of the impairment etc. of the native title, achieved by the Compensable Acts, to the First Respondent and the tenement holders; and
 - (iv) alternatively, may, in the event that objective economic value is to be determined by an assessment as if the act were a compulsorily acquired freehold estate as pleaded at FR POR [267]-[268], include:
 - (A) contrary to FR POR [267(c)], a component for 'special value', being any economic value over and above the market value of the land that a hypothetical freehold would have to the Applicant having regard to any economic use the Common Law Holders could make of the land because of their knowledge of, and unique ability to use, the land and its resources (which is distinct from Cultural Loss);
 - (B) a component for severance, injurious affection and/or disturbance as components of Economic Loss; and
 - (C) contrary to FR POR [296(b)], an amount by way of solatium for the granting of the acts without the Common Law Holders' consent (which is distinct from Cultural Loss).
 - (b) by reference to the diminution or impairment of the native title as a result of the inconsistency between:
 - (i) the Compensable Acts, including any and all rights conferred upon the tenement holder by the Compensable Acts; and
 - (ii) the ability of the Common Law Holders to continue to enjoy and exercise the native title.
39. YMAC takes no position in relation to POC [36], save for the matters of principle set out at [40] and [44] below.
40. In response to POC [37]-[38], FMG POR [37]-[38], and FR POR [298]-[299], YMAC:
- (a) admits that the Compensable Acts have caused loss, diminution, impairment or other effects on the cultural or spiritual aspect of the native title rights and interests (**Cultural Loss**);

- (b) says in response to FR POR [281] and [292] that whether it is appropriate for Cultural Loss to be assessed on an *in globo* basis depends upon the particular circumstances of the Compensable Acts and the evidence concerning the Cultural Loss;
- (c) says in response to FR POR [285]-[287] that:
 - (i) Cultural Loss, properly understood and in accordance with section 51(1) NTA, encompasses all effects of the Compensable Acts on the cultural or spiritual aspect of the native title rights and interests, assessed from the perspective of the Common Law Holders and according to their traditional laws and customs, whether or not those effects constitute a sense of “loss of connection to country”; and
 - (ii) for the reasons set out at [41] below, the mere fact of the grant of each of the Compensable Acts gives rise to an entitlement to Cultural Loss;
- (d) says in response to FR POR [280], [285], [287], [289]-[290] and [292] that:
 - (i) in general terms, native title rights and interests may be held on a communal, group or individual basis;
 - (ii) to the extent that the rights and interests of the Common Law Holders are communal rights, the effects of the Compensable Acts need not have been experienced by all Common Law Holders – or the Common Law Holders “as a group” – in order to constitute Cultural Loss, including because native rights and interests may be distributed on an intramural basis, whereby:
 - (A) some Common Law Holders may have particular connection to particular parts of the Claim Area; and/or
 - (B) some Common Law Holders may, on the basis of matters such as age, gender, or ritual status, hold a greater connection to the cultural or spiritual geography of particular parts of the Claim Area than some other Common Law Holders,

such that the effects of a Compensable Act may vary as between Common Law Holders; and

- (iii) the entitlement to compensation under section 51(1) NTA is for *all* effects on the native title rights and interests, not only for those effects on the native title which have been suffered or experienced by the Common Law Holders “as a whole”.

41. YMAC further says that:

- (a) Cultural Loss should be assessed as a monetary amount (on the basis of section 51(5) NTA) which fully compensates the Common Law Holders for the Cultural Loss in fact suffered by them, considered in light of what society would rightly regard as appropriate, fair, and just;
- (b) in assessing Cultural Loss, the Court should make reference to (at least) two different forms of Cultural Loss:
 - (i) The first, referred to in this pleading as **Dispossession Cultural Loss** is the cultural or spiritual aspect of the diminution or impairment of the native title rights and interests as a result of the inconsistency between:
 - (A) any and all rights conferred upon the tenement holder by the doing of the Compensable Act; and
 - (B) the recognition by the Australian legal system of the Common Law Holders’ connection to and rights to gain cultural and spiritual sustenance from the relevant part of the Claim Area in accordance with their traditional laws and customs;
 - (ii) The second, referred to in this pleading as **Effects Cultural Loss**, arises from the effects of activities done under, or pursuant to, a Compensable Act, on the Common Law Holders’ connection to, and rights to gain cultural and spiritual sustenance from, the Claim Area in accordance with their traditional laws and customs, which include effects on the Common Law Holders themselves.
- (c) in assessing Dispossession Cultural Loss, the Court should consider:

- (i) the value to the Common Law Holders of their connection to, and rights to gain cultural and spiritual sustenance from, the particular land the subject of the Compensable Act;
 - (ii) the extent to which the recognition by the Australian legal system of the Common Law Holders' connection to, and rights to gain cultural and spiritual sustenance from, the *particular land the subject of the Compensable Act*, under the Common Law Holders' traditional laws and customs, has been diminished by each Compensable Act; and
 - (iii) the extent to which the recognition by the Australian legal system of the Common Law Holders' connection to, and rights to gain cultural and spiritual sustenance from, *the Claim Area generally*, under the Common Law Holders' traditional laws and customs, has been diminished by the Compensable Acts.
- (d) in assessing Effects Cultural Loss, the Court should consider activities:
- (i) which have actually been done under or pursuant to the Compensable Acts up to the date of the hearing in this proceeding; and
 - (ii) that are likely to be done under or pursuant to the Compensable Acts, from the date of the hearing in this proceeding to the end of the term of each Compensable Act.
- (e) the activities referred to at (d) above may include directly or indirectly:
- (i) preventing or inhibiting the Common Law Holders' access to and use of the Claim Area;
 - (ii) preventing or inhibiting the Common Law Holders' ability to take resources from the Claim Area;
 - (iii) damaging or interfering with the cultural or spiritual geography of the Claim Area, including sacred sites;
 - (iv) damaging or adversely affecting the environment of the Claim Area, including any:
 - (A) reduction in amenity of nearby places;

- (B) introduction of non-native flora;
 - (C) reduction of native flora and fauna;
 - (D) reduction in the quality and quantity of water;
 - (E) release of contaminants, rubbish and/or waste into the natural environment;
 - (F) dust creation;
 - (G) visual pollution; and
 - (H) noise pollution.
- (v) causing social disruption, including in the form of any:
- (A) distress, anxiety and fear arising from the actual or potential effects on the country and its cultural or spiritual geography;
 - (B) distress, anxiety and fear of being held responsible by other Aboriginal people for failing to prevent actual or potential effects on the country and its cultural or spiritual geography; and
 - (C) conflict amongst and between Common Law Holders.
- (f) in assessing Cultural Loss, the Court should also take into account:
- (i) the extent to which the Compensable Acts affect future generations of Common Law Holders, notwithstanding the native title may no longer be subject to a Compensable Act;
 - (ii) any cumulative impact of the Compensable Acts on the native title rights and interests.

F3 The principles or criteria to be applied for determining compensation

42. In response to POC [39]-[40], FMG POR [39]-[40] and FR POR [300]-[301], YMAC:

- (a) admits POC [39]-[40], save that it says in relation to POC [39] that section 51(1) NTA sets out the *entitlement* to compensation, i.e. what the Common Law Holders are entitled to be compensated for, while sections 51(2)-(4) NTA supply the *principles or criteria* for determining that entitlement; and
- (b) says in response to FMG POR [39(c)-(e)] and FR POR [274]-[276] that:
 - (i) section 51A NTA has no application to this proceeding, as none of the Compensable Acts have extinguished all native title rights and interests in relation to particular land and waters; or
 - (ii) alternatively, section 51A is only relevant to Economic Loss; and
 - (iii) section 51A does not apply to any award of interest because interest is awarded on the compensation, rather than as part of the compensation.
- (c) in response to FMG POR [39(e)], repeats paragraph [38] above.

43. YMAC admits POC [41].

44. In response to POC [42], FMG POR [42] and FR POR [303], YMAC:

- (a) admits POC [42];
- (b) says in response to FR POR [303] that the entitlement to compensation arises under section 51(1) NTA, but the determination of that compensation entitlement involves application of the principles or criteria under section 51(3) NTA, and repeats paragraphs [33]-[34] above;
- (c) says in response to FMG POR [42(d)] that, on its proper construction, “social disruption” in section 123(4)(f) of the *Mining Act*:
 - (i) is not confined in the manner pleaded by FMG; and
 - (ii) includes the matters referred to at [40(e)(v)] above; and
- (d) refers to paragraph [45] below.

45. In response to POC [43]-[44], FMG POR [43]-[44] and FR POR [304]-[305], YMAC says that:

- (a) the entitlement to compensation is, on the basis of sections 24MD(3)(b) and 51(1) NTA, an entitlement on 'just terms' for any loss, diminution, impairment or other effect of the Compensable Acts on the native title of the Common Law Holders;
- (b) for the purposes of section 51(3) NTA, the principles or criteria for determining compensation set out in the law mentioned in section 240 NTA are those set out in section 123 of the *Mining Act*;
- (c) section 51(3) NTA, on its proper construction:
 - (i) directs the Court determining the compensation entitlement to apply any principles or criteria for determining compensation set out in section 123 of the *Mining Act*, whether or not those principles or criteria provide for compensation on just terms; but
 - (ii) does not have the effect that the entitlement provided by section 51(1) NTA in respect of the Compensable Acts is fulfilled or met by the provision of compensation which is less than just terms (contrary to FR POR [304(b)(iv)]); and
 - (iii) does not require the Court to apply *only* the principles or criteria in section 123 of the *Mining Act* for the purposes of determining the quantum of the entitlement;
- (d) alternatively to (c), sections 51(1) and 51(3) NTA, read together, have the effect that:
 - (i) the Common Law Holders have an entitlement to compensation for any loss, diminution, impairment or other effect of the Compensable Act on their native title rights and interests, which is to be assessed according to the principles or criteria in section 123 of the *Mining Act*, whether or not on just terms;
 - (ii) the Common Law Holders' entitlement to compensation is to be assessed using the principles or criteria under the *Mining Act* which would be applicable to an *owner of private land*, regardless of whether the native title is Exclusive Native Title or Non-Exclusive Native Title, with such adaptations as are necessary to address the

unique character of native title rights and interests, and in particular its cultural and spiritual aspect.

- (e) the entitlement of an owner of private land to compensation in respect of a mining tenement is to be assessed according to section 123 of the *Mining Act*, which includes:
 - (i) on the basis of sections 123(2) and (4), compensation for all loss and damage suffered or likely to be suffered resulting or arising from the mining, whether or not lawfully carried out in accordance with the *Mining Act*, which may include:
 - (A) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
 - (B) damage to the land or any part of the land;
 - (C) severance of the land or any part of the land from other land of, or used by, that person;
 - (D) any loss or restriction of a right of way or other easement or right;
 - (E) the loss of, or damage to, improvements;
 - (F) social disruption;
 - (G) in the case of land under cultivation, any substantial loss of earnings, delay, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agricultural holding, the failure on the part of a person concerned in the mining to observe the same laws or requirements in relation to that land as regards the spread of weeds, pests, disease, fire or erosion, or as to soil conservation practices, as are observed by the owner or occupier of that land; and

- (H) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining;
 - (ii) on the basis of section 123(5) of the *Mining Act*, compensation for any injury or depreciation in value, by the mining or any right of way, to land which is adjoining to or in the vicinity of land where mining takes place; and
 - (iii) on the basis of section 123(6) of the *Mining Act*, compensation for damage caused, by mining operations, to land within a mining tenement's boundaries (as distinct from land where mining takes place);
- (f) in the event the Common Law Holders are entitled to compensation on the basis of:
- (i) section 10 RDA and section 45 NTA, the entitlement to compensation (or additional compensation) is, on the basis of section 51(1) NTA, an entitlement on just terms to compensate the Common Law Holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests; and/or
 - (ii) section 53(1) NTA, the entitlement to compensation (or additional compensation) is compensation necessary to ensure that the paragraph 51(xxxi) acquisition is on paragraph 51(xxxi) just terms.

46. YMAC says that, on the basis of paragraphs [42]-[45] above, the Common Law Holders are entitled, in respect of each Compensable Act, to compensation for:

- (a) any Economic Loss, repeating [37]-[38] above;
- (b) any Cultural Loss, repeating [40]-[41] above;
- (c) any social disruption not already covered by Cultural Loss, repeating [44(c)] and [45(e)] above; and
- (d) on the basis of section 123(4) of the *Mining Act* and section 51(5) NTA, any likely costs of rehabilitation and restoration, including due to:
 - (i) damage to the land or any part of the land; and

- (ii) the need to reduce or control the damage resulting or arising from the mining,

repeating [45(e)] above; and

 - (e) any other loss, diminution, impairment or other effects of the Compensable Act on Common Law Holders' native title rights and interests, including any remaining loss or damage suffered or likely to be suffered resulting from or arising from the mining done pursuant to the Compensable Acts.
- 47. In response to POC [45], FMG POR [45] and FR POR [306], YMAC says that section 53(1) NTA:
 - (a) supplies an entitlement to such compensation or additional compensation as is required to ensure any paragraph 51(xxxi) acquisition – which need not be a “compulsory acquisition” for the purposes of section 51(2) NTA – is made on paragraph 51(xxxi) just terms; and
 - (b) is not subject to section 51(2) NTA.
- 48. In response to POC [46], FMG POR [46] and FR POR [307]-[308], YMAC:
 - (a) denies FR POR [307(b)(iv)] and repeats paragraph [42(b)] above;
 - (b) says that the Court, in determining the compensation entitlement under sections 24MD(3)(b) and 51(1) NTA, and in accordance with section 51(3) NTA and the principles or criteria in section 123 of the *Mining Act*, in respect of each Compensable Act should award compensation in respect of, according to the evidence:
 - (i) any Economic Loss;
 - (ii) any Cultural Loss;
 - (iii) any social disruption;
 - (iv) any likely costs of rehabilitation and restoration; and
 - (v) any other loss, diminution, impairment or other effects of the Compensable Act on Common Law Holders' native title rights and interests, including any remaining loss or damage suffered or likely

to be suffered resulting from or arising from the mining done pursuant to the Compensable Acts,

and repeats paragraphs [37]-[38], [40]-[41], [44], [45(e)], and [46] above.

- (c) admits that:
- (i) the Court should award interest on the Economic Loss component of the compensation in respect of each Compensable Act; and
 - (ii) any interest awarded should be calculated at a compounding interest rate from the date of the Compensable Act to the date of judgment.

Dated: ~~24 March 2023~~ 4 April 2023



Solicitor for Yamatji Marlpa Aboriginal Corporation

Statement pursuant to Federal Court Rules rr 16.01(a) and (b)

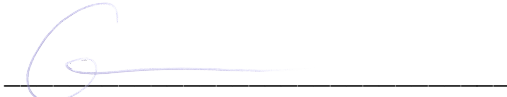
I, Tessa Herrmann, counsel for Yamatji Marlpa Aboriginal Corporation, prepared these pleadings.



Tessa Herrmann

Certificate of lawyer pursuant to Federal Court Rules r 16.01(c)

I, Colin McKellar, certify to the Court that, in relation to these pleadings, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.



Colin McKellar